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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 1097

GENE HICKMAN

Petitioner

V.

UNITED STATES OF AMERICA

Repondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.....

GENE HICKMAN

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V.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals For The Fifth Circuit

Petitioner, Gene Hickman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 13th of January, 1969.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported to date, but is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 19th of January 1969. An extension to

February 24, 1969, was granted by the Court for filing this petition. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTION PRESENTED

Did the trial judge in comments during his charge, prejudicially exceed the recognized limits of his role as impartial arbiter in the trial of this criminal proceeding, where, as contended by the petitioner, the evidence was evenly balanced.

STATUTE INVOLVED

Section 1341, Title 18, U.S.C.A.

STATEMENT OF THE CASE

Petitioner was convicted on each count of a three count mail fraud indictment in connection with the sale of men's hairpieces. The basis of the alleged scheme was that petitioner through newspaper ads would solicit inquiries, follow them up by personal contact, take orders and receive either the full price or a down payment, all with the intention of not delivering the merchandise.

The use of the mails was stipulated.

Petitioner had been previously employed in a similar business and during that time obtained hairpieces from a number of suppliers, some of which were known by some variation of the name "Taylor Topper" or "Tailored Topper".

Evidence was presented by the government as to some who had paid in full or in part but had never received their hairpieces and petitioner presented evidence of satisfied customers. One who had paid in full but who had not received his order was a Mr. Hancock, who testified in person.

Petitioner had in his possession a hairpiece when arrested that he contended was for Mr. Hancock but his delivery of same had been interrupted by his arrest and incarceration. It was presented into evidence.

The trial Court in charging the jury which was comprised of only three persons who had previously had any experience, state or federal, as jurors (R-266) stated at the outset (R-269) after preliminaries as to the nature and purpose of the indictment being merely the written charges:

> " . . . And they are, essentially, that he devised a scheme and an artifice to defraud some people by making false representations to them and by taking orders for hairpieces and taking money along with the orders and with never intending to deliver those hairpieces.
>
> In essence that is the charge. It is very much like plain old state charges of cheating and swindling, getting something for nothing. That is what the Government accuses him of doing.
>
> And they go further and say that he caused the mails to be used in furtherance of that scheme and artifice. And there is no serious dispute here, if any at all, that he caused the mails to be used. . . . "

After charging on the principal of good faith the trial judge then specifically referred to the Hancock transaction as follows (R-275, 276, 277):

> "Then Mr. Hancock. Now you saw these witnesses on the stand. You saw Mr. Hancock. You saw the color of his hair. You see this hairpiece which the defendant says he ordered specially for Mr. Hancock's head. You see the color of this hairpiece. You saw the color of Mr. Hancock's hair. Mr. Hancock's says that's not the color of my head.

Mr. Hickman said yes it is, yes it is. Those are circumstances in this case for you to consider. The wig will go with you to your room. Mr. Hancock will not. He was not offered in evidence. The wig was.

"Now if you find that this hairpiece was ordered by Mr. Hickman for Mr. Hancock that is a circumstance in favor of Mr. Hickman in this case. If you find that that hairpiece on the desk there was ordered by Mr. Hickman, as Mr. Hickman says it was, for Mr. Hancock's head, that is a circumstance in favor of Mr. Hickman in the case. If you find it was not that is a circumstance against Mr. Hickman in this case.

"I am expressing no opinion one way or the other. There are twelve of you who will go to the room. I say if that is not a hairpiece which was ordered especially by Mr. Hickman for Mr. Hancock, that will be a circumstance against the defendant in this case, because the law says that when a person is charged with crime and offers an explanation, if that explanation is proved to be false that is a circumstance to be considered in the case, along with all the other evidence, because ordinarily a person charged with crime if he is innocent, does not find it necessary to prevaricate or fabricate in order to offer an explanation.

"I make it plain again, I don't know. I express no opinion as to this hairpiece. You jurors will pass upon that question."

Exceptions were duly made to these portions of charge.

REASON FOR GRANTING THE WRIT

If the proper balance is to be maintained in the administration of criminal justice throughout the trial of a criminal case, the trial judge must continuously refrain from lending

the power, prestige and authority of his office, intentionally or unintentionally, to one side or the other. Especially so is the case when there is substantial evidence by a defendant of his bona fides in the case underway.

We respectfully submit the instant matter present a situation whereby the comments of the trial judge in the posture of the case as reflected by the record undeniably had their adverse effect upon the petitioner. In the beginning the charge was likened to cheating and swindling. Thereafter a particular bit of evidence was singled out and commented upon. (The Hancock transaction).

While the Court, of course, stated it was expressing no opinion, we humbly and respectfully urge that it did just the opposite. No other item of evidence was commented on as such. Nor was the demeanor or physical appearance of any other witness singled out.

In a criminal trial, no fact, may be determined by the trial judge. The plea of not guilty puts all in issue, even the most patent truths, **Roe v. United States,** 287 F2d 435, (C.A.5). It is the province and function of the jury to observe the witnesses, appraise their credibility, weigh their testimony, etc., **Wilcoxon v. United States,** 231 F2d 384, (C.A.10).

We do not mean to say that a trial judge cannot fairly comment on the evidence as such right stems from the common law. However, in this regard, Chief Justice Fuller in **Starr v. United States,** 153 U.S., 614, 14 SCT. 919, 38 L.Ed. 841, stated as follows concerning this power of a trial judge:

> "The influence of the trial judge on the jury is necessarily and properly of great weight and that his slightest word or intimation is received with deference, and may prove controlling."

In this same connection, we find the following language from the case of **Quercia v. United States,** 289 U.S. 466, 53 SCT. 698, 77 L Ed. 1321:

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office.*** His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that is should not be one-sided;' ***." Id 289 U.S. at 470, 53 S.Ct. at 699, 77 L.Ed. at 1325.

Petitioner submits that the comments of the trial judge below tended to a substantial degree to deny him a fair trial and were not within the general guidelines and boundaries established by this Court.

CONCLUSION

For the foregoing reasons, in the interest of fair administration of criminal justice at the trial level, the petitioner should be granted.

Respectfully submitted.

Joseph H. Davis
914 American Fed. Building
Macon, Georgia 31201

CERTIFICATE OF SERVICE

I, Joseph H. Davis, do certify that I have on the date shown below served the within petition upon the United States Attorney, Middle District of Georgia, Macon Division, Macon, Georgia, Counsel of Record for adverse party, by mailing same to him at his post office address, United States Courthouse, Macon, Georgia, and also by air mail upon the Solicitor General, Department of Justice, Washington, D. C. 20530, with first class postage prepaid in each instance.

This 24 day of February, 1969.

Joseph H. Davis,
Counsel of Record
for Petitioner

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25460

GENE HICKMAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia

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(January 13, 1969)

Before WISDOM and AINSWORTH, Circuit Judges, and JOHNSON, District Judge

PER CURIAM: Appellant, convicted on each count of a three-count indictment charging him, in each count, with mail fraud (18 U.S.C. § 1341) in connection with the sale of hairpieces, contends upon this appeal errors of a substantial nature in that:

(1) The trial court abused its discretion in refusing to grant appellant's motion for a bill of particulars;

(2) The evidence was insufficient to sustain a conviction upon either count; and

(3) The trial judge erred in analogizing the scheme alleged to that of a state charge of cheating and swindling, and also in emphasizing to the jury certain evidence and transactions which it could consider.

The counts were similar except as to the dates of the offenses; each charged basically that appellant, representing that he was doing business as Taylor Topper, had devised a scheme to defraud by inducing persons to order and pay for hairpieces which appellant knew would not be manufactured or delivered.

As to the bill of particulars point, appellant seems to complain that the Government used two witnesses who were not named in the indictment and that the failure and refusal of the trial court to require the Government to disclose the names of all its witnesses and to disclose all overt transactions upon which the prosecution was based was substantial error. Each count of the indictment charged with particularity the scheme to defraud, including names and dates. The purpose of a bill of particulars is to inform defendant and defense counsel of the facts constituting the offenses] charged so that they may be fairly informed, prepare defenses and perfect the record so as to bar subsequent prosecution. *Braden v. United States*, 272 F.2d 653 (5th Cir. 1960). Such motions are directed to the discretion of the trial judge. *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967); *Joseph v. United States*, 343 F.2d 755 (5th Cir. 1965), *cert. denial* 382 U.S. 828. Here, the record discloses that appellant was fairly apprised of the Government's theories and the particulars upon which each charge was based. He was entitled to no more.

On the question as to the sufficiency of the evidence, a careful review of the evidence offered by the Government in support of each count reflects that the schemes existed, were fraudulent or "reasonably calculated to deceive persons of ordinary prudence and comprehension, and that the mail service of the United States" was used in the execution of the schemes. *Silverman v. United States*, 213 F.2d 405 (5th Cir. 1954), *cert. denied* 348 U.S. 828. The evidence on these questions was for consideration and determination by the jury and not for the court through the use of judgment for acquittal. Certainly the evidence, when considered as a whole and in a light most favorable to the Government, was more than sufficient to sustain the conviction. *Downing v. United States*, 348 F.2d 594 (5th Cir. 1965), *cert. denied* 382 U.S. 901.

Appellant's complaints as to the court's charge are based upon isolated statements lifted from the charge as a whole. Such statements, the repetition of which will serve no purpose here, must be assessed in the light of the complete charge and in the context as made. *Smith v. United States*, 355 F.2d 912 (5th Cir. 1966), *reh. denied* 358 F.2d 695, *cert. denied* 384 U.S. 1001; *Beck v. United States*, 317 F.2d 865 (5th Cir. 1963), *cert. denied* 375 U.S. 972; *Temple v. United States*, 330 F.2d 724 (5th Cir. 1964), *cert. denied* 379 U.S. 831. The isolated statements, when considered with the charge in its entirety, were not misleading or confusing. The ultimate resolution of the critical issues was left to the jury, with adequate instructions as to the applicable law and without substantially prejudicial comment.

We do not find any prejudicial error in this record; the appellant received a fair trial, and the conviction on each count is AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 25460

D. C. Docket No. CR. 8545

GENE HICKMAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee,

Appeal from the United States District Court for the Middle District of Georgia.

Before WISDOM and AINSWORTH, Circuit Judges, and JOHNSON, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 13, 1969

Issued as Mandate:

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1097

GENE HICKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 8-10; II R. 293-296) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1969 (Pet. App. 11; II R. 297). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Black until February 28, 1969, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the course of his charge to the jury, the trial judge improperly commented on the evidence.

STATEMENT

Indicted and tried in the United States District Court for the Middle District of Georgia, petitioner was convicted on three counts of using the mails in a scheme to defraud, in violation of 18 U.S.C. 1341 (I R. 1-5). On November 3, 1967, he was sentenced to concurrent terms of a year-and-a-day (I R. 283-284). On appeal the convictions were affirmed (Pet. App. 8-10; I R. 284; II R. 297).

Government testimony showed a scheme under which petitioner, operating under variations of the name Taylor Topper,[1] placed newspaper advertisements for hairpieces for bald men, contacted the customers after they had responded through the mails to the advertisements, and obtained money or checks as deposits from the customers. Although he left forwarding addresses and promised delivery of the hairpieces, he would then fail to deliver them. Customers who had paid deposits received neither the hairpieces

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[1] Petitioner formerly worked for Taylor Topper Inc. of New York (I R. 190). He told some customers that he was obtaining his hairpieces from Taylor Topper Company of California. The vice-president of that company denied that petitioner was authorized to work for his company (I R. 15-16, 76-77, 99, 101-102).

nor a refund of their money (I R. 14, 16-17, 19, 26, 47-48, 65, 70).

Petitioner introduced the testimony of two elderly men who said they had received their hairpieces and were satisfied with them (I R. 150, 153, 158-159). Petitioner testified that when he was arrested he had a hairpiece ready for delivery to one Hancock (I R. 220-221). Hancock testified, however, that this hairpiece, which was introduced into evidence at trial, did not match the color of his hair (I R. 263).

In the final instructions to the jury, the court stated that the indictment contained the charges against petitioner, and continued (I R. 269-270):

> * * * And they are, essentially, that he devised a scheme and an artifice to defraud some people by making false representations to them and by taking orders for hairpieces and taking money along with the orders and with never intending to deliver those hairpieces.
>
> In essence that is the charge. It is very much like plain old state charges of cheating and swindling, getting something for nothing.
>
> That is what the Government accuses him of doing.
>
> And then they go further and say that he caused the mails to be used in furtherance of that scheme and artifice. Well, there is no serious dispute here, if any at all, that he caused the mails to be used. * * *

Petitioner objected to the analogy to the state offenses of cheating and swindling on the ground that there was evidence of activities in Florida, Tennessee, and Georgia and that it was not known what the law was in those states (I R. 280-281).

Also, after referring to petitioner's evidence of good faith as a complete defense, the court instructed (I R. 276-277):

> Then Mr. Hancock. Now you saw these witnesses on the stand. You saw Mr. Hancock. You saw the color of his hair. You see this hairpiece which the defendant says he ordered specially for Mr. Hancock's head. You see the color of this hairpiece. You saw the color of Mr. Hancock's hair. Mr. Hancock says that's not the color of my head, Mr. Hickman [petitioner] said yes it is, yes it is. Those are circumstances in this case for you to consider. The wig will go with you to your room. Mr. Hancock will not. He was not offered in evidence. The wig was.
>
> Now if you find that this hairpiece was ordered by Mr. Hickman for Mr. Hancock that is a circumstance in favor of Mr. Hickman in this case. If you find that hairpiece on the desk there was ordered by Mr. Hickman, as Mr. Hickman says it was, for Mr. Hancock's head, that is a circumstance in favor of Mr. Hickman in the case. If you find it was not that is a circumstance against Mr. Hickman in this case.
>
> I am expressing no opinion one way or the other. There are twelve of you who will go to the room. I say if that is not a hairpiece which was ordered especially by Mr. Hickman for Mr. Hancock, that will be a circumstance against the defendant in this case, because the law says that when a person is charged with crime and offers an explanation, if that explanation is proved to be false that is a circumstance to be considered in the case, along with all the other evidence, because ordinarily a person charged with crime if

> he is innocent, does not find it necessary to prevaricate or fabricate in order to offer an explanation.
>
> I make it plain again, I don't know. I express no opinion as to this hairpiece. You jurors will pass upon that question.

Petitioner objected to this charge as "unduly commenting upon the evidence" (I R. 281).

ARGUMENT

The court's charge must be read in its entirety. *Boyd* v. *United States*, 271 U.S. 104; *United States* v. *Gainey*, 380 U.S. 63; *Temple* v. *United States*, 330 F. 2d 724, 725 (C.A. 5), certiorari denied, 379 U.S. 831. While it is questionable whether in *any* setting the challenged observations of the trial judge could be considered unfair or misleading, in the present case, in context, they were completely unexceptionable.

The reference to state offenses of swindling and cheating fell well within the judge's responsibility for clarifying the nature of crimes charged in the indictment. He quite properly explained that the essence of the mail fraud with which petitioner was charged resembled the deceitful activities customarily thought of as within state jurisdiction. The additional circumstance bringing the allegations into federal court was the use of the mails, a circumstance which was not seriously disputed. The court in no way intimated that petitioner was being tried on any state court charges of cheating and swindling, but only that the disputed elements were analogous to such offenses.

The court's remarks about the Hancock hairpiece were clearly innocuous and scrupulously fair to both sides. The trial judge merely summarized the competing claims made by the prosecution and the defense and explained the inferences that could be drawn if one side or the other were believed. Even though a federal judge may comment on the evidence, *Quercia* v. *United States*, 289 U.S. 466, 469, the judge in this case distinctly and carefully stated that he was expressing *no* opinion on the facts either way. His impartial explanation of the theories of the case was poles apart from undue intrusion on the jury's function.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
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Attorneys.

MARCH 1969.

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